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JUN 29 1943
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No. 126

Supreme Court of the United States.

OCTOBER TERM, 1943.

THOMAS P. NICHOLS & SON COMPANY,
Petitioner,

v.

THE NATIONAL CITY BANK OF LYNN
AND
FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS

AND

BRIEF IN SUPPORT THEREOF.

ARTHUR V. GETCHELL,
WILLIAM G. TODD,
WILLIAM HERBITS,
Attorneys for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Thomas P. Nichols & Son Company respectfully shows:

Summary Statement of Matters Involved.

The petitioner originally brought proceedings against the respondent, The National City Bank of Lynn, on November 2, 1936. This action resulted in the entry of judgment for the petitioner on January 8, 1940, in the sum of approximately $42,000, execution issuing therefor on January 9, 1940. Pending the hearing on the merits of this action, The National City Bank, hereinafter called the Bank, by appropriate resolutions, had entered into a voluntary liquidation of its affairs on December 3, 1938.

The Bank was organized and existing under the banking laws of the United States, and its deposits were insured by the respondent Federal Deposit Insurance Corporation, hereinafter called the Corporation.

The petitioner was unable to satisfy its execution after appropriate demand upon the liquidating Bank, finding that the assets of the Bank, by virtue of an agreement between it and the Corporation, had been transferred and assigned to the Corporation as security for the repayment of a loan made for the purpose of facilitating the voluntary liquidation, under the Federal Reserve Act, section 12 B (*n*) (4), 12 U.S.C. sec. 264 (*n*) (4).

The petitioner thereupon brought the present proceeding in equity against said respondents to enforce payment of its execution by the Corporation out of the Bank's assets or their proceeds in the hands of the Corporation, or otherwise. This equity proceeding was heard by a judge of the Superior Court, sitting without jury, who denied to the plaintiff the relief sought, and limited it in its attempt to secure satisfaction of its execution to the assets of the Bank, but subject to such right, title, and interest as the Corporation had in and to said assets.

The petitioner appealed from the final decree entered in said case to the Supreme Judicial Court of the Commonwealth of Massachusetts, which rendered an opinion (1943 Mass. Adv. Sh. p. 449) which appears in the record submitted herewith, confirming the decision of the lower court.

Jurisdiction.

Since this is an action involving the interpretation and construction of the provisions of section 12 B of the Federal Reserve Act, as amended, and more particularly paragraph (4) of subsection (*n*) of said section, and as the decision of the Supreme Judicial Court of Massachusetts

affects the rights of shareholders and creditors to the assets of a national bank in voluntary liquidation, and since the case cannot be decided on any independent ground of local law, and since it would also seem that the case presented involves a question of validity under the due process clause of the Constitution of the United States, Amendment XIV, sec. 1, it is submitted that the jurisdiction of this court to review said decision is properly invoked under federal laws (Judicial Code, sec. 237 (*b*), 43 Stat. 937, 28 U.S.C. sec. 344). Furthermore, the question presented seems to be a unique and novel one and never before presented to this court for adjudication, and if the decision in respect to the case is sustained, it is repugnant to the many decisions establishing the rights of creditors to share pro rata in the assets of a national bank in voluntary liquidation.

Questions Presented.

1. Did Congress by the amendment of the Federal Reserve Act, sec. 12 B (*n*) (4), intend to confer upon the Corporation the right to arbitrarily discriminate against creditors and depositors of a national Bank in voluntary liquidation under a plan conceived, dictated, supervised and consummated by the Corporation in order to reduce the risk or avert a threatened loss to it?

2. Did Congress under said amendment, subsection (*n*) (4), authorizing the Corporation to make loans upon such terms and conditions as it may determine, which loans "may be in subordination to the rights of depositors and other creditors," intend by this clause to permit the Corporation to elect and prefer certain creditors and depositors to whose claims it would subordinate its rights, and who would be paid in full to the utter exclusion of other creditors and depositors, who would receive nothing?

3. If as matter of fact in the liquidation plan the parties thereto fully intended and desired to provide for the full payment of the Bank's obligations to all depositors and creditors, but through inadvertence, mistake or negligence the liquidation agreement failed to provide for certain creditors or depositors or certain classes thereof, are the latter then precluded from ratably participating with other creditors and depositors in the assets of the Bank, or will not equity regard that as done which it was intended to do and which ought to have been done and restore to such excluded claimants their rights to equal participation as originally contemplated and intended by the parties to the plan?

4. If the findings of fact by the trial judge justify the conclusion that the Corporation actually subordinated its rights under the loan agreement to those of all creditors and depositors, but through misconception, inadvertence, mistake or negligence the plaintiff's claim was not provided for in any written contract and such contracts were unambiguous as decided by the Supreme Judicial Court of Massachusetts, is the plaintiff thereby and on that account precluded from participating ratably with other creditors and depositors in the Bank's assets?

5. Can the Corporation, which was created to instill in the public mind confidence in all banking institutions of our country, under the facts and circumstances of the plaintiff's case having set up a plan which was intended to provide for the full payment of creditors and depositors, be relieved of its obligation by an analogy adopted by the Supreme Judicial Court of Massachusetts, which decides in effect that the transaction in this case, being made for a valid consideration, without fraud and while the Bank was solvent, was a common-law transaction creating the relationship of lender and borrower, ignoring the fact that the money advanced in this instance never actually reached

the borrower, never was controlled by the borrower but by the lender, who dictated and controlled not only its disposition but also the disposition of the cash and all other independent assets of the borrower, and alone voluntarily defended the plaintiff's original law action against the Bank, after the consummation of the liquidation plan?

6. Do the facts in this case show a violation of the plaintiff's rights under the due process clause of the Constitution of the United States, Amendment XIV, sec. 1?

Reasons for Granting the Writ.

The decision is not in accord with many decisions of the courts of the United States which hold that voluntary liquidation presupposes payment in full to all creditors and is predicated on that principle.

The decision erroneously interprets that part of subsection (*n*) (4) which permits the corporation to subordinate its rights to those of depositors and creditors to mean that such intention on the part of the corporation must be expressly evidenced in some written instrument; and that it cannot be determined by a resort to the actions and the conduct of the corporation in the particular transaction, regardless of how plainly the intention to so subordinate itself is manifested.

This decision ignores the beneficent character of the corporation as Congress intended it to be and clothes it in the garb of an ordinary money-lending corporation which it is not.

The decision further holds in effect that equity has no right in the present situation to carry out the intention and purpose of the parties to pay in full creditors and depositors of a solvent national bank in voluntary liquidation, and to correct an error or mistake which inadvertently caused a creditor of such bank to be excluded from partici-

pation in the assets of the liquidating bank on a parity with all other creditors, thereby causing the creditor irreparable loss.

If this writ does not issue, a decision against the plaintiff will be sustained which ignores the plan of voluntary liquidation of a solvent national bank which, prior to the execution of a formal contract of loan including a collateral note, had made provision for all other depositors and general creditors who were not included in the corporation's written contract and definitely concludes that the plaintiff cannot prevail because it alone was not mentioned in the subsequent contract or the collateral note.

In other words, it looks to the form of the contract between the corporation and the bank which was only a part of the plan and ignores the substance of the whole transaction which contemplated provision for all depositors and general creditors alike.

This is a matter of great importance to the plaintiff involving a very substantial sum of money, and if the decision of the Supreme Judicial Court of Massachusetts is sustained the plaintiff will be deprived of substantial rights.

Further reasons why this writ should issue are set forth under the heading of "jurisdiction."

Wherefore it is respectfully submitted that the petition should be granted.

ARTHUR V. GETCHELL,
WILLIAM G. TODD,
WILLIAM HERBITS,
Attorneys for Petitioner.